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Standard Chartered Bank (M) Bhd v Eastern Supplies & Consulting Sdn Bhd (previously known as Eastern Supplies Marketing Sdn Bhd) & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(NCC)(W)-776–04 OF 2013
ZAHARAH IBRAHIM, ANANTHAM KASINATHER AND MAH WENG KWAI JJCA
7 MARCH 2014

Civil Procedure — Appeal — Facts, finding of — Interference by appellate court — Whether appellant bank adduced insufficient evidence to prove that it remitted monies to Indonesia — Whether trial judge erred in finding of fact — Whether trial judge plainly wrong in arriving at conclusion — Whether appellate interference warranted

Contract — Guarantee — Corporate guarantor — Whether corporate guarantor liable for breaches committed by first respondent

The appellant bank had appointed the first respondent as its remittance agent ('RA') to sell and operate the 'MoneyHome Service' programme, a banking product to help Indonesians working in Malaysia to remit money home to their dependants in Indonesia. It was a term of the agreement between the parties that the first respondent as the RA would open a designated account with the appellant and deposit the remittance amounts and the administrative fees it collected from the appellant's customers into the designated account. The appellant would then remit the monies to Bank Pertama in Indonesia for the benefit of the recipient beneficiaries of the appellant's customers. The second respondent was the corporate guarantor who undertook that in consideration of the appellant agreeing to appoint the first respondent as the RA it would indemnify the appellant up to the maximum liability of RM1m, on demand by the appellant, for any losses or damages suffered by the appellant as a result of any breaches committed by the first respondent as the RA. The third, fourth and fifth respondents were at all material times the shareholders and directors of the first respondent. The appellant claimed that the first respondent had collected remittance amounts of RM432,458.90 and administrative fees of RM2,381.20 from its customers during the period 28 January 2010 and 11 February 2010 but had failed to deposit the same into the designated account. Subsequently, the appellant had remitted the remittance amounts of RM432,458.90 to Indonesia and paid the administrative fees even though there were insufficient funds in the designated account. The appellant claimed that the first respondent was indebted to it for the total sum of RM434,840.10,

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namely the remittance amounts plus the administration fee, and filed the present action against the first respondent for breach of agreement and breach of trust and against the second respondent as guarantor for the breaches committed by the first respondent. The appellant contended that the third, fourth and fifth respondents had neglected to ensure that the first respondent had deposited the monies collected into the designated account and failed to ensure that there were sufficient funds for remittance to Indonesia and that in the circumstances the corporate veil should be lifted so that they could be held liable for the breaches of the first respondent.The first respondent denied committing any breach and put the appellant bank to strict proof that it had failed to deposit the monies collected into the designated account. The second respondent also disclaimed liability on the basis that the first respondent had not committed any breaches. The third, fourth and fifth respondents averred that the first respondent was a separate legal entity and there was no ground to merit or justify the lifting of the corporate veil. The respondents counterclaimed against the appellant for inter alia the non-payment of the commission and loss of reputation of goodwill. The trial judge found as of fact that the first respondent had collected the remittance amounts from the appellant's customers but had not simultaneously deposited the same into the designated account. However, the trial judge held that there was insufficient evidence adduced to prove that the appellant had remitted the total sum of RM432,458.90 to Indonesia and accordingly dismissed the appellant's claim against the respondents and also the whole of the counterclaim. The appellant appealed to the Court of Appeal against that part of the decision which dismissed its claim. The real issue in this appeal was whether the appellant had remitted the sum of RM432,458.90 to Indonesia without a similar amount being deposited into the designated account by the first respondent.

Held, allowing the appeal in part:

(1) The first respondent had keyed in the information that he had collected the total sum of RM434,840.10, namely the remittance amounts plus the administration fee, from the appellant's customers. However, the first respondent was unable to produce any deposit receipts to prove that the monies collected had been deposited into the designated account. However, the reconciliation reports generated during the period from 28 January 2010 to 11 February 2010 had confirmed that first respondent had failed to deposit the remittance amounts and administrative fees into the designated account. As such, the trial judge was correct in finding that the first respondent had collected the remittance amounts from the appellant's customers but had not simultaneously deposited the same into the designated account (see para 26 Issue 1).

(2) The various pieces of evidence such as the fact that there had been no complaints from any one of the beneficiaries in the 47 transactions that involved monies collected from its customers, the fact that the first

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respondent had keyed in data to prove the collections, the reconciliation reports generated by the system that clearly proved that the appellant had remitted the remittance amounts to Indonesia and the statement of accounts issued by the appellant to the first respondent certifying and confirming the payment of the remittance amounts of RM432,458.90 and administrative fees of RM2,381.20 from its customers proved on a balance of probabilities that the appellant had in fact remitted the remittance amounts to Indonesia. In the circumstances, the trial judge had erred in finding otherwise (see para 26 Issue 2(i)(a) & (b)).

(3) It is trite that an appellate court would not generally intervene and interfere with findings of fact unless the trial court was shown to be plainly wrong in arriving at its conclusion. In the present case it was clear that the trial court was plainly wrong in arriving at its conclusion that there was insufficient evidence adduced by the appellant to prove that it had in fact remitted the remittance amounts to Indonesia (see para 26 Issue 2(i)(c)).

(4) Although there was no express provision in the agreement between the appellant and the first respondent compelling the appellant to voluntarily advance the remittance monies when there were insufficient funds in the designated account, the appellant in the spirit of good banking and commercial practice and good corporate governance had honoured its obligation to remit the monies collected from its customers to the beneficiaries in Indonesia. If the appellant had not advanced and remitted the remittance amounts, it would have been accused of breach of trust of the monies collected (see para 26 Issue 2(ii)(e)).

(5) The second respondent as the corporate guarantor of the first respondent was liable for the breaches of agreement and breach of trust by the first respondent (see para 31).

[Bahasa Malaysia summary

Perayu bank telah melantik responden pertama sebagai ejen pngiriman wangnya ('PP') untuk menjual dan melaksanakan program 'MoneyHome Service', suatu produk perbankan untuk membantu warga Indonesia yang bekerja di Malaysia mengirim wang pulang kepada tanggungan mereka di Indonesia. Adalah terma perjanjian antara pihak-pihak bahawa responden pertama sebagai PP akan membuka akaun yang ditetapkan dengan perayu dan deposit jumlah pengiriman dan yuran pentadbiran yang dikutip daripada pelanggan-pelanggan perayu ke dalam akaun yang ditetapkan itu. Perayu kemudian akan mengirim wang itu kepada Bank Pertama di Indonesia untuk manfaat penerima benefisiari pelanggan-pelanggan perayu. Reponden kedua adalah penjamin korporat yang mengaku janji bahawa sebagai balasan perayu bersetuju melantik responden pertama sebagai PP ia akan menanggung rugi perayu sehingga liabiliti maksimum RM1 juta, atas tuntutan oleh perayu,

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untuk apa-apa kerugian atau kerosakan yang dialami oleh perayu akibat daripada apa-apa pelanggaran yang dilakukan oleh responden pertama sebagai PP. Responden-responden ketiga, keempat dan kelima adalah pada setiap masa matan pemegang-pemegang saham dan pengarah-pengarah responden pertama. Perayu mendakwa bahawa responden pertama telah mengutip RM432,458.90 jumlah pengiriman dan RM2,381.20 yuran pentadbiran daripada pelanggan-pelanggannya sepanjang tempoh 28 Januari 2010 dan 11 Februari 2010 tetapi telah gagal untuk mendepositkan jumlah tersebut ke dalam akaun yang ditetapkan. Berikutan itu, perayu telah menghantar jumlah pengiriman RM432,458.90 ke Indonesia dan membayar yuran pentadbiran meskipun dana tidak mencukupi dalam akaun yang ditetapkan. Perayu mendakwa responden pertama terhutang dengannya untuk jumlah keseluruhan RM434,840.10, iaitu jumlah pengiriman dan yuran pentadbiran, dan telah memfailkan tindakan ini terhadap responden pertama kerana pelanggaran perjanjian dan pelanggaran amanah dan terhadap responden kedua sebagai penjamin kerana pelanggaran-pelanggaran yang dilakukan oleh responden pertama. Perayu berhujah bahawa responden-responden ketiga, keempat dan kelima telah cuai untuk memastikan bahawa responden pertama telahpun mendepositkan wang yang dikutip ke dalam akaun yang ditetapkan dan telah gagal untuk memastikan bahawa terdapat wang yang mencukupi untuk pengiriman ke Indonesia dan bahawa dalam keadaan itu tirai perbadanan patut diketepikan supaya mereka boleh diputuskan bertanggungjawab untuk pelanggaran-pelanggaran responden pertama. Responden pertama menafikan telah melakukan apa-apa pelanggaran dan meletakkan perayu bank untuk bukti yang ketat bahawa ia telah gagal mendepositkan wang yang dikutip ke dalam akuan yang ditetapkan itu. Responden kedua juga menafikan liabiliti berasaskan bahawa responden pertama tidak melakukan apa-apa pelanggaran. Responden-responden ketiga, keempat dan kelima menegaskan bahawa repsonden pertama adalah entiti undang-undang yang berasingan dan tiada asas untuk mewajarkan atau menjustifikasikan pengetepian tirai pemerbadanan. Responden-responden menuntut balas terhadap perayu untuk, antara lain, tiada bayaran komisen dan kehilangan reputasi dan nama baik. Hakim perbicaraan mendapati bahawa menurut fakta bahawa responden pertama telah mengutip jumlah pengiriman daripada pelanggan-pelanggan perayu tetapi tidak pada masa yang sama mendepositkan wang tersebut ke dalam akaun yang ditetapkan. Walau bagaimanapun, hakim perbicaraan memutuskan bahawa terdapat keterangan yang tidak mencukupi yang dikemukakan untuk membuktikan bahawa perayu telah menghantar keseluruhan jumlah RM432,458.90 ke Indonesia dan sewajarnya menolak tuntutan perayu terhadap responden-responden dan juga keseluruhan tuntutan balas. Perayu telah merayu ke Mahkamah Rayuan terhadap bahagian keputusan yang menolak tuntutannya itu. Isu sebenar dalam rayuan ini adalah sama ada perayu telahpun mengirim jumlah RM432,458.90 ke Indonesia tanpa jumlah sama didepositkan ke dalam akaun yang ditetapkan oleh responden pertama.

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Diputuskan, membenarkan sebahagian rayuan:

(1) Responden pertama telah memasukkan maklumat bahawa dia telah mengutip jumlah keseluruhan RM434,840.10, iaitu jumlah pengiriman dan yuran pentadbiran, daripada pelanggan-pelanggan perayu. Walau bagaimanapun, responden pertama tidak dapat mengemukakan apa-apa resit deposit untuk membuktikan wang yang dikutip tersebut telah didepositkan ke dalam akaun yang ditetapkan. Namun begitu, laporan-laporan penyelarasan yang dihasilkan sepanjang tempoh dari 28 Januari 2010 hingga 11 Februari 2010 mengesahkan bahawa responden pertama telah gagal untuk mendepositkan jumlah pengiriman dan yuran pentadbiran itu ke dalam akaun yang ditetapkan. Oleh itu, hakim perbicaraan adalah betul kerana mendapati responden pertama telah mengutip jumlah pengiriman daripada pelanggan-pelanggan perayu tetapi pada masa yang sama tidak mendepositkan wang tersebut ke dalam akaun yang ditetapkan (lihat perenggan 26 Issue 1).

(2) Pelbagai keterangan seperti fakta bahawa tidak terdapat apa-apa aduan daripada mana-mana benefisiari dalam 47 transaksi yang melibatkan wang yang dikutip daripada pelanggan-pelanggannya, fakta bahawa responden pertama telah memasukkan data bagi membuktikan pengutipan laporan-laporan penyelarasan yang dihasilkan oleh sistem yang jelas membuktikan bahawa perayu telah menghantar jumlah pengiriman itu ke Indonesia dan penyata-penyata akaun yang dikeluarkan oleh perayu kepada responden pertama memperakui dan mengesahkan bayaran jumlah pengiriman RM432,458.90 dan yuran pentadbiran RM2,381.20 daripada pelanggan-pelanggannya membuktikan atas imbangan kebarangkalian bahawa perayu sebenarnya telah menghantar jumlah pengiriman ke Indonesia. Dalam keadaan itu, hakim perbicaraan terkhilaf dalam penemuan sebaliknya (lihat perenggan 26 Issue 2(i)(a) & (b)).

(3) Adalah undang-undang nyata bahawa mahkamah rayuan tidak akan pada amnya campur tangan dan mengganggu penemuan fakta kecuali mahkamah perbicaraan menunjukkan ia salah dalam membuat kesimpulannya. Dalam kes ini adalah jelas bahawa mahkamah perbicaraan telah silap dalam membuat kesimpulannya bahawa tidak terdapat keterangan mencukupi yang dikemukakan oleh perayu bagi membutikan bahawa ia sebenarnya telah menghantar jumlah pengiriman itu ke Indonesia (lihat perenggan 26 Issue 2(i)(c)).

(4) Walaupun tiada peruntukan nyata dalam perjanjian antara perayu dan responden pertama yang mewajibkan perayu untuk secara suka rela mendahulukan wang pengiriman itu apabila tiada wang mencukupi dalam akaun yang ditetapkan, perayu dengan amalan baik perbankan dan komersial dan tadbir urus baik telah menepati tanggungjawabnya untuk mengirim wang yang dikutip daripada pelanggan-pelanggannya

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kepada benefisiari-benefisiari di Indonesia. Jika perayu tidak mengemukakan dan menghantar jumlah pengiriman itu, ia akan dituduh melanggar amanah untuk wang yang dikutip itu (lihat perenggan 26 Issue 2(ii)(e)).

(5) Responden kedua sebagai penjamin korporat kepada responden pertama adalah bertanggungjawab untuk pelanggaran-pelanggaran perjanjian dan pelanggaran amanah oleh responden pertama (lihat perenggan 31).]

Notes

For cases on finding of facts, see 2(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1103–1238.

Cases referred to

Bank Bumiputra Malaysia Bhd v Emas Bestari Sdn Bhd and another appeal [2014] 2 MLJ 49; [2014] 1 CLJ 316, CA (refd)

Heng Cheng Swee v Bangkok Bank Ltd [1976] 1 MLJ 267; [1979] 1 LNS 179, FC (refd)

Lee Eng Eow (as Director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee (as executrix of the estate of Low Ai Lian) & Ors [1999] 3 MLJ 481, CA (refd)

Public Bank Bhd & Anor v Exporaya Sdn Bhd [2013] 1 MLJ 507; [2013] 2 CLJ 753, CA (refd)

Sivalingam a/l Periasamy v Periasamy & Anor [1995] 3 MLJ 395, CA (refd)

Tenaga Nasional Bhd v Irham Niaga Sdn Bhd & Anor [2011] 1 MLJ 752, CA (refd)

Wee Lian Construction Sdn Bhd v Ingersoll -Jati Malaysia Sdn Bhd [2010] 3 MLJ 425, CA (refd)

Legislation referred to

Evidence Act 1950 s 90A, 90A(2)

Appeal from: Civil Suit No D-22NCC-1618 of 2010 (High Court, Kuala Lumpur)

Chin Tzi Song (Emmy Hazwani Jamil with him) (Arifin & Partners) for the appellant.

Mohd Rifahmi bin Abdul Musikin (Bahari & Bahari) for the first, third, fourth and fifth respondents.

Abd Latiff Ahmad (Ruhaizahanim bt Buyong with him) (Abd Latiff Ahmad & Co) for the second respondent.

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Mah Weng Kwai JCA (delivering judgment of the court):

BRIEF FACTS

[1] The appellant, a licensed commercial bank ('the bank') entered into a remittance agency and right of use agreement dated 12 November 2008 ('the agreement') with the first respondent ('the remittance agent').

[2] Under the agreement the appellant appointed the first respondent as its remittance agent to sell and operate its banking product known as 'MoneyHome Service' programme whereby the first respondent would collect monies from customers at various collection centers and deposit into a designated account with the appellant. The appellant would then remit the monies to Bank Pertama in Indonesia for the benefit of the recipient beneficiaries of the customers.

[3] The salient features of the agreement were that:

(a) the customers were customers of the bank, not of the first respondent which was the remittance agent only;

(b) the monies collected by the first respondent and credited into the designated account were held on trust for the customers (cl 5.4 of the agreement);

(c) the 'MoneyHome Service' programme was essentially a banking product to help Indonesians working in Malaysia to remit money home to their dependents in Indonesia;

(d) the first respondent was to collect the remittance amounts and the administrative fees from the customers and deposit the monies collected into the designated account; and

(e) the appellant would pay a commission up front to the first respondent for the services rendered.

[4] Under a letter of guarantee dated 19 September 2008, the second respondent as the corporate guarantor, undertook unconditionally and irrevocably to guarantee the performance of the first respondent as the remittance agent of the appellant. The second respondent had agreed, on demand by the appellant, to indemnify the appellant up to the maximum liability of RM1m for any losses, damages, expenses and costs that may be suffered by the appellant as a result of the first respondent's breach of the agreement.

[5] The third, fourth and fifth respondents were at all material times the shareholders and directors of the first respondent.

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A THE APPELLANT'S CLAIM

[6] The appellant's claim against the first respondent was for breach of agreement and breach of trust in respect of the total sum of RM434,840.10 being the remittance amounts of RM432,458.90 and administrative fees of RM2,381.20 collected by the first respondent during the period between 28 January 2010 and 11 February 2010 but which the first respondent had failed to deposit into the designated account.

[7] The appellant had nonetheless remitted the remittance amounts of RM432,458.90 to Indonesia as it felt it was contractually bound to do so as it was a trustee of the monies collected by the first respondent from the customers.

[8] The appellant's claim against the second respondent was as guarantor under the letter of guarantee for the breach/es committed by the first respondent.

[9] The appellant's claim against the third, fourth and fifth respondents was as directors of the first respondent, who had in breach of trust failed and/or neglected to ensure that the first respondent had deposited the monies collected into the designated account and for failure to ensure there were sufficient funds available for remittance to Indonesia at all material times. The appellant contended that the third, fourth and fifth respondents were the alter ego and the directing will and mind of the first respondent and that the corporate veil ought to be lifted so that they could be held liable for the breach/es of the first respondent.

THE RESPONDENTS' DEFENCE

[10] In para 10 of its amended defence, the first respondent denied it was in breach of the agreement and put the appellant to strict proof that it had failed to deposit the monies collected into the designated account whilst in para 12 the first respondent averred 'Defendan Pertama juga menegaskan bahawa semua wang kiriman pelanggan yang dikutip/diambil dari pelanggan telahpun dimasukkan ke dalam Akaun Khas tanpa gagal seperti yang tertera di dalam penyata bulanan Akaun Khas'.

[11] The second respondent in its amended defence merely pleaded that the first respondent was not in breach of the agreement and that it (the second respondent) was not liable to pay any sums to the appellant.

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[12] The third, fourth and fifth respondents averred that they were not liable for the conduct and/or omissions of the first respondent as the first respondent was a separate legal entity and there was no ground or merit to justify the lifting of the corporate veil.

[13] The first, third, fourth and fifth respondents in turn counterclaimed against the appellant for, inter alia, non-payment of the commission, business expenses incurred, loss of business opportunity and loss of reputation of goodwill.

DECISION OF THE HIGH COURT

[14] After a full trial the learned trial judge held that there was insufficient evidence adduced by the appellant to prove that it had in fact remitted the remittance amounts of RM432,458.90 to Indonesia and accordingly dismissed the claim against all the respondents. The learned trial judge not only dismissed the appellant's claim for the remittance amounts in this sum of RM432,458.90 but also the administrative fees in the sum of RM2,387.20 paid to M Cash (M) Sdn Bhd.

[15] The learned trial judge also dismissed the whole of the counter-claim.

APPEAL TO THE COURT OF APPEAL

[16] Being dissatisfied with the dismissal of the claim by the learned trial judge, the appellant appealed to the Court of Appeal against that part of the said decision.

DECISION OF THE COURT OF APPEAL

[17] Upon reading the record of appeal and the written submissions of counsel for the appellant and the respondents and upon hearing the oral submissions of counsel aforesaid, the court allowed the appellant's appeal against the first and second respondents in terms of prayers a) and b) only of para 27 of the amended statement of claim. The court however dismissed the appellant's appeal against the third, fourth and fifth respondents.

APPLICATION FOR LEAVE TO APPEAL TO THE FEDERAL COURT BY THE FIRST AND SECOND RESPONDENTS

[18] Being dissatisfied with the decision of this court, the first and second respondents have now applied for leave to appeal against the decision to the Federal Court.

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[19] It will be noted that the appellant has not similarly applied for leave to appeal against that part of the decision dismissing the claim against the third, fourth and fifth respondents.

GROUNDS OF DECISION

[20] In this appeal two main issues had to be determined by the court namely:

(a) Issue 1 — Whether the first respondent had collected the remittance amounts and the administrative fees from the customers and deposited the same into the designated account and

(b) Issue 2:

(i) whether the appellant had remitted the remittance amounts in the sum of RM432.458.90 by way of an advance to and on behalf of the first respondent to Bank Pertama of Indonesia for the period of 28 January 2010 till 28 February 2010 and paid the sum of RM2,381.20 as administrative fees to M Cash (M) Sdn Bhd, and

(ii) ahether the appellant was obliged under the agreement to advance the remittance amounts and remit the same to Indonesia and to pay the administrative fees to M Cash (M) Sdn Bhd, even though there was insufficient funds in the designated account, and therefore the first respondent is indebted to the appellant in the total sum of RM434,840.10.

[21] At the hearing in the High Court, the learned trial judge had considered several other issues. The first was whether the M-System, an online computer software programme known as M-Cash used by both the first respondent and the appellant to collect and to remit the remittance amounts respectively to Indonesia, was at all material times functioning properly and did not contain any error in the system.

[22] On this issue, this court held that there was no serious dispute by the first respondent on the proper functioning and reliability of the M-System. A certificate under s 90A of the Evidence Act 1950 was in any event produced by the appellant and marked as exh P27 without challenge from the first respondent. This was unlike the situation in *Bank Bumiputra Malaysia Bhd v Emas Bestari Sdn Bhd and another appeal* [2014] 2 MLJ 49; [2014] 1 CLJ 316 where it was held by the Court of Appeal that where a computer generated document was not accompanied by a certificate unders 90A(2), it was inadmissible. Thus, the learned trial judge correctly held that it must be accepted that the computers that were used in the M-System were in good and proper working order at the material time.

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[23] A second issue that was considered by the learned trial judge was that the appellant in the original statement of claim had stated that the remittance amounts remitted to Indonesia was an amount *overdrawn* by the first respondent on the designated account but that this averment was later amended to state that the sum remitted was an *advance* granted to the first respondent. In our judgment we are of the view that nothing much turns on this consideration as the court, having allowed the amendment, and the parties must be bound by the amended pleading and it serves no useful purpose to dwell on the pre-amendment position. In any event and in the circumstances of this case, no real distinction can be drawn between 'an overdrawn account' and 'an advance' as any monies paid by the appellant ahead of any monies credited into the designated account by the first respondent would be a pre-payment of monies by the appellant resulting in a debit/negative sum in the designated account. Further, as a matter of fact, the designated account was not an overdraft facility granted to the first respondent but a special purpose account created for the MoneyHome Service programme. In pith and substance the real issue in this case was not whether it was an overdrawn account or an advance but whether the appellant had remitted the sum of RM432,458.90 to Indonesia without a similar amount being deposited into the designated account by the first respondent.

[24] Returning to the consideration of Issues 1 and 2(i) and (ii) above, it will be useful to understand the mechanics and modus operandi of the HomeMoney Service programme.

[25] Clauses 5 and 7 of the agreement, in summary provide as follows:

Collection of Remittance Amounts:

(a) The first respondent as the remittance agent, shall open a designated account with the appellant and shall deposit the remittance amounts and the administrative fees collected from the customers into the designated account no later than the first business day after the collection (clause 5.1). The appellant shall issue duly endorsed deposit slips to the first respondent. Each customer would be given an identity number.

(b) The first respondent shall at all times ensure that there is sufficient money in the designated account to enable the appellant to debit the account on a daily basis (clause 5.2). A Reconciliation Report on the daily transactions generated by the M-System shall be final and binding as to the status of the account.

(c) The appellant shall be entitled to debit such remittance amounts and administrative fees from the designated account two business days after the collection from customers.

(d) The first respondent acknowledged and agreed that all remittance amounts were held on trust for the customers.

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(e) The first respondent shall be solely responsible for the accuracy and completeness of all data keyed-in into the M-System by the first respondent and its uthorized users.

(f) Until the remittance amounts collected and deposited into the designated account, the first respondent shall bear all responsibility for and risk over the sums collected.

(g) At the end of each business day, the M-System would generate Reconciliation Reports based on the information keyed into the M-System by the first respondent. Both the appellant and the first respondent could access the M-System at any time and print the Reconciliation Reports.

(h) Based on the Reconciliation Reports, the appellant would generate the Payment Settlement Reports and remit the remittance amounts to Indonesia. After remittance, the M-System would generate the Remittance Reports.

(i) Thereafter the appellant would deduct the remittance amounts and administrative fees from the designated account.

[26] Having understood the mechanics of the programme, let us now consider the following issues:

Issue 1 — Whether the first respondent had collected the remittance amounts and the administrative fees from the customers and deposited the same into the designated account:

(a) the learned trial judge in his judgment found as of fact that the first respondent did collect the remittance amounts from the customers but that the first respondent did not immediately or simultaneously deposit the same into the designated account;

(b) what this meant was that the first respondent had keyed in the data into the M-System to show the collections made from the customers. However as the remittance amounts were not deposited into the designated account, the reconciliation reports generated by the M-System at the end of the day did not reflect such sums being deposited into the designated account;

(c) the court is of the view that the finding of the learned trial judge on this point is correct as it is in evidence that not even one deposit receipt endorsed by the appellant was produced by the first respondent to prove that the monies had in fact been deposited into the designated account. Further, the agreement provides that the reconciliation reports are final and binding on the appellant and the first respondent. The reconciliation reports confirmed that for the period from 28 January 2010 to 28 February 2010, the first respondent had failed and/or

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omitted to deposit the remittance amounts and administrative fees into the designated account although the first respondent had keyed into the M-System to show that collections in the total sum of RM434,840.10 had been made from the appellant's customers.

Issue 2(i) — Whether the appellant had remitted the remittance amounts in the sum of RM432,458.90 by way of an advance to and on behalf of the first respondent to Bank Pertama of Indonesia for the period of 28 January 2010 till 28 February 2010 and paid the sum of RM2,381.20 as administrative fees to M Cash (M) Sdn Bhd:

(a) the learned trial judge in dismissing the appellant's claim had held that there was insufficient evidence to prove that the appellant had in fact remitted the remittance amounts to Indonesia for the period from 28 January 2010 to 28 February 2010:

(b) in our judgment we are of the view that, with respect, the learned trial judge came to an erroneous finding in view of the following evidence which when taken together cumulatively, will prove on a balance of probabilities, that the appellant did in fact remit the remittance amounts to Indonesia. And in doing so the appellant had in fact and in law advanced the monies to and on behalf of the first respondent, as the first respondent as the remittance agent had failed to deposit the said monies into the designated account. The reasons in support of our conclusion are as follows:

(i) there was not even one complaint received from any of the beneficiaries in the 47 transactions involved. Surely, if monies had been collected from the customers and none of the beneficiaries had received any monies from the appellant, there would have been an outcry of complaints of breach of trust thrown at the appellant, but surprisingly there was no evidence of any complaints received at all;

(ii) the first respondent had in fact keyed in the data into the M-System to prove the collections. The reconciliation reports generated by the M-System at the close of business daily had captured the data pertaining to the collections (exh P28, *rekod rayuan* 2(2) at pp 278–351);

(iii) payment settlement reports (exh P29, *rekod rayuan* 2(3) at pp 381–576) based on the reconciliation reports were generated by the M-System to facilitate the remittance of the remittance amounts to Indonesia;

(iv) upon the completion of the remittances, reconciliation reports (exh P30, *rekod rayuan* 2(3) at pp 517–581) were generated by the M-System. These reports clearly proved that the appellant had remitted the remittance amounts to Indonesia. Unfortunately, the

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learned trial judge did not seem to have considered these reconciliation reports in his grounds of judgment;

(v) the statement of accounts (exh P24, *rekod rayuan* 2(3) at p 380) issued by the appellant to the first respondent clearly certified and confirmed that the appellant had remitted the sum of RM432,458.90 to Indonesia and paid the sum of RM2,381.20 as administrative fees to M Cash (M) Sdn Bhd, the provider of the M-System;

(vi) Invoices for the payment of the administrative fees by the appellant were issued by M Cash (M) Sdn Bhd on 3 February 2010 and 2 March 2010 (exh P31, *rekod rayuan* 2(4) at pp 582–635); and

(vii) Hoo Yau Siang (PW2) in his evidence had clearly explained the link between the reconciliation reports with the payment settlement reports; the payment settlement reports with the remittance reports and the payment settlement reports with the statement of accounts. (Question and Answer Nos 5 to 15 in PW2's witness statement, *rekod rayuan* 2(1) at pp 130–134).

(c) It is trite that an appellate court will not generally intervene and interfere with findings of facts unless the trial court is shown to be plainly wrong in arriving at its conclusion (see *Wee Lian Construction Sdn Bhd v Ingersoll -Jati Malaysia Sdn Bhd* [2010] 3 MLJ 425) or when there is a serious misdirection of law or fact by the trial judge (see *Sivalingam a/l Periasamy v Periasamy & Anor* [1995] 3 MLJ 395). In the present case it is our judgment that the trial court was plainly wrong in arriving at its conclusion that there was insufficient evidence adduced by the appellant to prove that it had in fact remitted the remittance amounts to Indonesia.

Issue 2(ii) — Whether the appellant was obliged under the agreement to advance the remittance amounts and remit the same to Indonesia and to pay the administrative fees to M Cash (M) Sdn Bhd, even though there was insufficient funds in the designated account, and therefore the first respondent is indebted to the appellant in the total sum of RM434,840.10:

(a) according to cl 5.4 of the agreement, the monies collected from the customers were trust monies held by the appellant as the customers were customers of the appellant, not of the first respondent. The fact that the reconciliation reports had been generated by the M-System after the relevant data had been keyed in by the first respondent, showed that the monies had been collected from the customers;

(b) thereafter, in so far as the customers and beneficiaries were concerned, it mattered not whether the first respondent had failed and/or omitted to deposit the remittance amounts into the designated account, as the

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appellant being the principal (not the first respondent, the agent) would be held responsible in any event and liable for the trust monies and answerable to the customers;

(c) thus, it was not wrong for the appellant to 'advance' the sum of RM434,840.10 to and on behalf of the first respondent for remittance of the remittance amounts to Indonesia and to pay the administrative fees to M Cash (M) Sdn Bhd. Had the appellant not advanced and remitted the remittance amounts, the appellant would no doubt have been accused of breach of trust of the monies collected from the customers. By advancing the remittance amounts, the appellant had in fact 'lent' money to the first respondent and had paid the monies before they were due to be paid;

(d) with respect, we cannot agree with the learned trial judge that the appellant's fear of committing a breach of trust and of being sued by its customers was not a good reason to make the advance. Neither can we agree with the conclusion that the appellant had at its own risk voluntarily advanced the monies on behalf of the first respondent as there was no provision in the agreement requiring the appellant to do so;

(e) Albeit there was no express provision in the agreement compelling the appellant to make the advance and that the appellant had done so voluntarily but it must be remembered that the appellant, in the spirit of good banking and commercial practice and good corporate governance, had honoured its obligation to remit the monies collected from its customers to the beneficiaries in Indonesia. The court is mindful that while words like 'good corporate governance, accountability and transparency' are not concepts of law (see *Tenaga Nasional Bhd v Irham Niaga Sdn Bhd & Anor* [2011] 1 MLJ 752) nonetheless the law 'should guard against the facilitation of fraud and exact a reasonable standard of care by bankers in order to combat fraud and to protect bank customers and innocent third parties'. An appropriate line of balance must be drawn (see *Public Bank Bhd & Anor v Exporaya Sdn Bhd* [2013] 1 MLJ 507; [2013] 2 CLJ 753 (CA)). It would be a day most foul if the appellant had abandoned its obligations on the premise that the first respondent, its agent had failed to deposit the collections into the designated account. In the final analysis it must not be forgotten that the first respondent had already collected the monies from the customers, yet the first respondent was not taken to task (or taken to task sufficiently) for failing to account for the collections to date. In light of the circumstances it behoves the court to compliment the appellant for taking the stand that it did, primarily on the basis that the half million ringgit would have meant so much to the 47 beneficiaries who would have otherwise ended up as victims of the first respondent's fraudulent conduct;

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(f) in any event, the learned trial judge had in fact in his grounds of judgment held that 'in my view there is ample evidence to suggest that on a balance of probabilities, the first defendant (the first respondent) had not deposited all the amount collected';

(g) that being the case, the real issue for determination was not one of liability but one of quantum of the amount owing by the first respondent. From the various reports generated by the M-System, the court is satisfied that the appellant had proven that the first respondent was indeed indebted to the appellant in the sum of RM434,840.10 being the sum total of the remittance amounts and the administrative fees which the first respondent had failed to deposit into the designated account.

POSITION OF THE SECOND RESPONDENT

[27] Clause 3.5 of the agreement provided that it was a fundamental condition of the appointment of the first respondent as the remittance agent to procure the issuance of a bank guarantee and a corporate guarantee and in consideration of the appellant agreeing to appoint the first respondent, the second respondent unconditionally and irrevocably guaranteed the first respondent's satisfactory performance of its obligations under the agreement. The second respondent agreed to be a principal debtor of the guaranteed sum not exceeding RM1m and that upon a demand by the appellant on the second respondent for such amount as a result of or in connection with any breach, the second respondent undertook to pay the amount specified in such demand (see irrevocable letter of guarantee dated 19 September 2008 marked exh P2 — *Rekod Rayuan* Jld 2(2) at p 222).

[28] In the case of *Heng Cheng Swee v Bangkok Bank Ltd* [1976] 1 MLJ 267; [1979] 1 LNS 179 the Federal Court said, inter alia, as follows:

> The issue between the parties here must surely rest on the construction to be placed on the words of the guarantee in question. The principles to be applied in construing a document of this kind are re-stated in *Tan Chong & Sons Motor Co Ltd v Yang Ching Lang* [1967] 1 MLJ 125 following *Lloyd's v Harper* [1880] 16 Ch D290, 303 and that is that 'a guarantee, like every other contract, must be construed reasonably; it must be construed by the words used, but also with regard to the surrounding circumstances'.

[29] The irrevocable letter of guarantee must therefore be considered together with the agreement and the surrounding circumstances. The appellant approved the terms of the agreement subject to conditions precedent being fulfilled one of which was the provision of the irrevocable letter of guarantee. It

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was in compliance of this condition precedent that the second respondent had executed the irrevocable letter of guarantee.

[30] The second respondent as the corporate guarantor of the first respondent under the irrevocable letter of guarantee was thus held liable for the breach/es of the agreement and breach of trust by the first respondent.

POSITION OF THE THIRD TO FIFTH RESPONDENTS

[31] As the appellant has not applied for leave to appeal against the dismissal of its claim against the third to the fifth respondents, it will not be necessary for this court to state the grounds for doing so in detail. Suffice to say, the court found there was no ground to lift the corporate veil of the first respondent to impugn personal liability on the third to the fifth respondents. In the Court of Appeal decision in *Lee Eng Eow (as Director of Lee Guat Cheow & Co Sdn Bhd) v Mary Lee (as executrix of the estate of Low Ai Lian) & Ors* [1999] 3 MLJ 481, it was held that it is elementary that an incorporated association has a legal personality of its own apart from the persons who comprise it.

[32] And in his book *Company Law*, (2nd Ed) p 52, it was stated by Walter Woon that:

> Incorporation of any company casts a veil over the true controllers of the company, a veil through which the law will not usually penetrate. However, in certain situations a court will ignore the separate legal personality of a company and look to the members of the controllers of the company. This is colourfully referred to as 'lifting the veil'. The situations in which the veil may be lifted are exceptional. In general, the courts will respect the company's modesty and decline to lift the veil. The only justification for lifting the veil of incorporation is that the company Is in fact not a separate entity. This requires evidence. If the evidence does not establish that the company is run as a mere extension of its controllers' affair, the veil of incorporation should remain firmly in place. However, if it can be proven that the company is in fact not a separate entity from its controllers, a court might be persuaded to lift the veil in the appropriate circumstances.

[33] On the facts, there was nothing to suggest that the first respondent was not in fact a company lawfully incorporated with its separate entity.

CONCLUSION

[34] In the result, the appellant's appeal was allowed in part. The appeal against the first and second respondents in terms of prayers a) and b) only of para 27 of the amended statement of claim was allowed whilst the appeal against the third to the fifth respondents was dismissed.

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A *Appeal allowed in part.*

Reported by Kohila Nesan

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